ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D.P. MARSHALL, JR., JUDGE

DIVISION II

CA07-470

16 January 2008

LEON'S CATFISH & RESTAURANT, INC. and FARMERS INSURANCE CO., APPELLANTS	AN APPEAL FROM THE PULASKI SHRIMP COUNTY CIRCUIT COURT [CV 2006-11442]
v.	THE HONORABLE MARY SPENCER
HOSTO & BUCHAN, P.L.L.C. and REBECCA WINBURN, APPELLEES	MCGOWAN, CIRCUIT JUDGE
	AFFIRMED

The circuit court granted summary judgment based on the statute of limitations to Hosto & Buchan, P.L.L.C., and one of its lawyers in this legal-malpractice case. The question presented is whether the circuit court erred by entering judgment in the face of a tolling argument. We affirm because Judge McGowan ruled correctly: these lawyers were entitled to judgment as a matter of law.

This case starts with a fire at Leon's Catfish and Shrimp Restaurant in Jefferson County. An employee of J.W. Johnson Roofing & Remodeling, Inc. allegedly caught Leon's on fire with a propane torch while repairing the restaurant's roof vent. Leon's insurer, Farmers Insurance Company, paid for the damage. Farmers then hired Hosto & Buchan, P.L.L.C., to pursue a subrogation claim against the allegedly errant roofing company and its employee.

Hosto & Buchan filed suit within the statute of limitations. But the law firm failed to serve

the defendants within 120 days of filing the complaint, or to get a timely extension to do so, as required by Rule of Civil Procedure 4(i). The statute of limitations on the claims against the roofer expired in November 2002. Ark. Code Ann. § 16-56-105 (Repl. 2005).

Hosto & Buchan got untimely service on J.W. Johnson Roofing. Faced with a motion to dismiss based on limitations, Hosto & Buchan eventually nonsuited the case. When Leon's and Farmers learned about the service problem, they fired Hosto & Buchan. New counsel refiled the case. The roofer, however, got it dismissed based on limitations.

Leon's and Farmers filed their malpractice case—this case—against Hosto & Buchan in October 2006. That was almost four years after the alleged malpractice occurred and three years and three months after they learned that the alleged malpractice had occurred. On these undisputed facts, the circuit court was correct in granting summary judgment to the lawyers.

Arkansas follows the occurrence rule in legal-malpractice cases. *Ragar v. Brown*, 332 Ark. 214, 219–20, 964 S.W.2d 372, 375 (1998). Leon's and Farmers had to commence their case within three years of the date that "the last element essential to the cause of action occurs, unless the attorney actively conceals the wrongdoing." *Ragar*, 332 Ark. at 219, 964 S.W.2d at 375 (internal quotation omitted); Ark. Code Ann. § 16-56-105. Their claim accrued when Hosto & Buchan failed to commence the case against the roofer within the statute of limitations.

The lawyers' failure to complete timely service of the case meant that it was never commenced under Rule of Civil Procedure 3. *Green v. Wiggins*, 304 Ark. 484, 486–89, 803 S.W.2d 536, 537–39 (1991). When the case was not timely served, Hosto & Buchan should have nonsuited it promptly. That dismissal would have complied with Rule of Civil Procedure 4(i), removed the stale case from the trial court's docket, and avoided a Rule of Civil Procedure 12(b)(8) problem in a later

lawsuit. A nonsuit at this point, however, would not have triggered the savings statute and its one-year grace period because the first lawsuit had not been properly commenced by timely filing and timely service. Ark. Code Ann. § 16-56-126(a)(1) (Repl. 2005); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 710–11, 120 S.W.3d 525, 530–31 (2003) (collecting cases). Notwithstanding the no-commencement defect, the claim against the roofer could still have been pursued if Hosto & Buchan had refiled the case before the statute of limitations ran on the claim. This step would have opened a new 120-day window for Leon's and Farmers to commence the case through timely service. But when the case was not refiled by November 2002, three years after the fire, Arkansas law barred the claim against the roofer, and Leon's and Farmers's claim against the lawyers accrued.

This legal-malpractice case should therefore have been filed no later than November 2005. Leon's and Farmers, however, did not sue Hosto & Buchan until October 2006. That was almost a year too late. Nor does it salvage the claim that Leon's and Farmers did not discover the alleged malpractice until July 2003. Arkansas does not follow the discovery rule. *Ragar*, 332 Ark. at 219–20, 964 S.W.2d at 375. Even if we assume that Hosto & Buchan actively concealed the alleged malpractice, *ibid*., this exception to the occurrence rule offers no relief to Leon's and Farmers. It was undisputed that they learned about the no-commencement problem with the first suit in July 2003. Even starting the three-year clock at that time, their October 2006 complaint against Hosto & Buchan was filed almost three months too late.

Leon's and Farmers argue that they could not sue their first lawyers until their refiled complaint against the roofer was dismissed with prejudice based on the limitations bar. Not until that point, their argument goes, were they damaged, and thus not until that point did their malpractice

claim accrue.

Leon's and Farmers are mistaken. First, their argument starts with a false premise. No court needed to adjudicate that their underlying lawsuit was lost before they had a claim for malpractice. Leon's and Farmers's claim against the roofer was barred as a matter of law in November 2002 when the statute of limitations ran before their lawyers had properly commenced the lawsuit. This has been settled law since the *Green* case, which was decided more than fifteen years ago. *See also Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 162, 165–66, 226 S.W.3d 757, 763, 765–66 (2006); *Bodiford v. Bess*, 330 Ark. 713, 715–16, 956 S.W.2d 861, 862–63 (1997). Leon's and Farmers could not resuscitate their case with an untimely nonsuit.

Second, the authority they offer for their tolling argument does not apply. *Cf. Pope County v. Friday, Eldredge & Clark*, 313 Ark. 83, 852 S.W.2d 114 (1993); *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989). In these cases, the party in Leon's and Farmers's shoes won a disputed issue in the underlying case, only to lose the point on appeal. As the Supreme Court made plain in *Ragar*, that unique circumstance tolls the limitations period for a malpractice claim because no actionable negligence existed during this interim period when the party had actually prevailed. 332 Ark. at 220–21, 964 S.W.2d at 375–76. Here, Leon's and Farmers never prevailed in their underlying cases against the roofer. Their belated nonsuit of the never-commenced first case after the statute of limitations had run against the roofer was not a victory. It was a futile step that had no legal effect.

We therefore affirm the summary judgment in favor of Leon's and Farmers's first lawyers.

VAUGHT and MILLER, JJ., agree.